1946

File No. O. Irrigation 46

Legal Department
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Subject:— Opinions under the Bombay Irrigation Act, 1879

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File No. O. Irrigation /46

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Legal Department File No. O.Irrigation /1946.

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Settled in accordance with the provisions of section 79. If, therefore, Mr.Behre is willing to accept, the amount agreed upon between him and Government, as compensation, it should be made clear to him that it is with his full consent. Accordingly Government should not accept the condition suggested by him at 'X' on p.35 ante.

Sd/

P.A.

A copy of the Memo. of Second Appeal filed in the High Court by Mr.Behre, is not on L.D. records. But from Para.7 of the grounds of C.A. No.82 of 1942 filed in the Court of the Assistant Judge, of West Khandesh, it appears that Mr. Bhere must have challenged the corrections of the entry in the Irrigation Record of Rights made in respect of the reservoir to the water of which he claims exclusive use. As the entry to be made under section 76 (c) and (d) of the Irrigation Act,1879 should not be inconsistent with the view which the High Court may take in appeal in respect of the entry now challenged it is advisable to await the decision in the Second Appeal. If the appeal goes against Mr.Bhere, it is possible that Government may not have to pay any compensation or if any compensation is payable under section 79 of the Bombay Irrigation Act, the amount payable may not be as high as is now proposed.

Sd/

D.S.

Please put with this file a copy of the Bombay Irrigation Act with amendments up to date.

Sd/A.R.Khan.6/5/46.

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It appears that by G.R.,R.D. No.5086, dated the 6th June 1910, Government among other things permitted Mr.Behare to construct a pucca Bandhara (dam) across the nulla within the limits of Nimbhoni village, and to connect the same to his ~~fikki~~ fields by means of a channel to be constructed by him, exempting him from the payment of water rate for a period of 20 years.

In October 1933, one Mr.G.A. Wani applied for permission to take water from this nulla for purposes of irrigation. Mr.Behare objected to this permission being granted to Mr.G.A.Wani during the enquiry made by the Mamlatdar in connection with his application. The Mamlatdar in August 1934 reported to the District Deputy Collector, W.D. that the period ~~of~~ for which exemption from payment of water rate was to last in case of Mr.Behare had expired in 1933 as the consturction of the Bandhara had been completed in 1913, and proposed that water rate at Rs.4 per acre from 1933-34 should be levied on the lands of Mr.Behare thus irrigated. The Dist. Deputy Collector W.D. sanctioned this proposal

Some-time before the said proposal of the Mamlatdar was sanctioned by the Dist.Dy.Collector W.D.,viz.in February 1934 Mr. Behare put in a claim before the Collector of West Khandesh to the effect that he alone was entitled to the use of the nulla water, contending at the same time that the proposed rate (viz at. Rs.4 per acre) was excessive, and praying that it should be reduced.

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2. The Collector of West Khandesh after making necessary inquiry into the matter decided that Mr. Behare's request that he should be declared to be the sole person to be entitled to take water from the nulla could not be granted and that the water rate already fixed was appropriate and could not be reduced. Against this decision of the Collector of West Khandesh Mr. Behare preferred an appeal to the Commissioner, C.D., who rejected the same in September 1936.

In August 1937, Mr.G.A. Wani again applied to the Collector, West Khandesh, to take water from this Bandhara but Mr. Behare objected to granting such permission. After making necessary inquiries, the Collector of West Khandesh declared that the Bandhara belonged to Government and that in view of the G.R.R.D. No. 7421/33 dated 8th December 1933, no water rate was chargeable for water taken for agricultural purposes from the Bandhara. Against this decision Mr. Behare in July 1939 preferred an appeal to the Commissioner, C.D. This appeal was heard and decided by the Bombay Revenue Tribunal. The Bombay Revenue Tribunal held that Mr. Behare's prayer to the effect that he alone should be declared entitled to the water must fail as no such declaration

could be granted ex parte, that the Collector's order was wrong and the appellent (Mr. Behare) was the owner of the Bandhara subject to the conditions in the permission originally granted to him.

In December 1939, Mr. Behare requested the Collector, West Khandesh, to make necessary alterations in the irrigation Record of Rights. The Collector of West Khandesh thereupon referred the matter to the Commissioner, C.D. and on receiving his instructions directed the Mamlatdar to make necessary alterations in the records and informed Mr. Behare accordingly. In pursuance of the order of the Mamlatdar which was based upon the direction given by the Collector of West Khandesh in the matter the village officers made the necessary entry in the irrigation record of Rights in February 1940.

Being dissatisfied with what had been done by the revenue officers so far as his rights in the Bandhara and the water of the nulla were concerned, Mr. Behare instituted a civil suit (Civil Suit No. 7 of 1941) in the Court of the F.C. Subjudge (now called Civil Judge, Senior Division), Dhulia against the Province of Bombay for a declaration to the effect that he (Mr. Behare) alone is entitled to the use of the water of the nulla stored in consequence of the Bandhara constructed by him, and for getting the relevantentry in the Irrigation

Record of Rights corrected accordingly. The F.C. Sub Judge, Dhulia, dismissed the suit holding inter alia that Mr. Behare did not prove that he had exclusive right to the water accumulated in the nulla by the Bandhara and flowing through the channel constructed by him and that the entry in the Irrigation Record of Rights was not inconsistent with the order of the Bombay Revenue Tribunal as alleged by him.

Being aggrieved with this decision, Mr. Behare filed civil appeal No. 82 of 1942 in the District Court, West Khadesh. This appeal was heard by the Assistant Judge, West Khandesh. who confirmed the decree of the lower court.

Against this decision of the Assistant Judge, West Khandesh, Mr. Behare has gone in appeal to the High Court (Second Appeal No. 562 of 1944). This appeal is still pending in the High Court.

In course of his judgment, the Assistant Judge, West Khandesh, while explaining the position as regards the rights of the parties in the water of the nulla and the Bandhara in question, has observed as follows:-

"In this case, the dam in question was constructed by the appellant at his own cost, and thereby an artificial reservoir of water was executed in the nulla. Section 73 of

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the Irrigation Act empowers Government to declare any canal, channel, stream, river or pipe, etc. natural or artificial, whether constructed maintained or controlled by Govt. or not, which is actually used or required for the purposes of irrigation as a Second Class Irrigation Work. The proviso to that section, however, lays down that no artificial reservoir or water course supplied from such reservoir which is actually used for the purposes of irrigation by a singly irrigator shall beincluded in such notification except either with the consent of such irrigator or if in the opinion of the Governor-in-Council such inclusion is necessary in the public interest, then without such consent but subject to the payment of compensation".

In view of these observations, Govt. by G.L.No. 108-H dated 11-4-46 asked the Collector of West Khandesh to ascertain the amount of compensation payable to Mr. Behare and submit the requisite draft notification under section 73 of the Bombay Irrigation Act. In pursuance of this G.L., the Collector of West Khandesh proposed that Rs. 1000 should be paid to Mr. Behare as compensation while the view of the Commissioner, C.D. was that the Rs. 2500 should be paid as compensation to Mr. Behare. Mr. Behare however claimed Rs.5000 adding that he would be prepared to accept this amount provided his rights in appeal filed by him in the High Court against the decision of the Asst. Judge, West Khandesh are not prejudiced.

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This being the position, the R.C.D. is of the opinion that it does not seem advisable to notify the work viz. the Bhandhara in question as Second Class Irrigation Work under section 73 of the Bombay Irrigation Act and to settle the question of compensation pending the decision of the High Court in the Second Appeal preferred by Mr. Behare, and that it does not appear to be worth while to settle the question of compensation with Mr. Behare subject to the condition that his rights in appeal filed by him in the High Court may not be barred. The R.L.A. has been requested to advise what course Govt. should take in the circumstances stated above.

We may reply as follows:-

As Mr. Behare has already filed a Second Appeal against the decision of the Assistant Judge, West Khandesh, it seems advisable to await the decision of the High Court in the matter. The question of payment of compensation to Mr. Behare under section 73 of the Bombay Irrigation Act may be taken up after his appeal in the High Court is decided. The view taken by the R.C.D. appears to be correct.

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Office of the R.J.A.

As Mr. Behare has already filed a Second Appeal against the decision of the Assistant Judge, West Khandesh, it seems advisable to await the decision of the High Court in the matter. The question of payment of compensation to Mr. Behare under section 73 of the Bombay Irrigation Act, may be taken up after his appeal in the High Court is decided. The view taken by the R.C.D., appears to be correct.

P.N.M.

21/5/46.

Remembrancer of Legal Affairs.

U.R. TO R.C.D.No. 3826, dated the 22nd May 1946.

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Letter.

To

The Commissioner, Central Division.

No.108-D. Bombay, 31st May 1946.

Reference your letter, No.I.R.R.2/470, dated 23rd February 1946.

As Mr. Behare has already filed a Second Appeal against the decision of the Assistant Judge, West khandesh, Government consider it advisable to await the decision of the High Court in the matter. The question of payment of compensation to Mr. Behare under section 73 of the Bombay Irrigation Act, 1879, may, therefore be taken up after his appeal in the High Court is decided.

By order of the Governor of Bombay

Assistant Secretary to the Government of Bombay, Reconstruction Department.

Copies forwarded to:-

The Collector of West Khandesh (with reference to his letter No.I.R.R-33, dated 8th February 1946).
The Remembrance of Legal Affairs (with reference to his No.3826, dated 22nd May 1946).

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Office of the R.L.A.

In his endorsement at page 15 ante the Commissioner, Central Division observes :-

"Under the previous system a man took water on his own request without security. His tenant took water on his security or some other security. What is to happen in the new Act(i.e. the Bombay Irrigated Crop Regulation Act,1944) where we say you must take water. The Superior Holder must obviously be held responsible but I wonder if he could be held responsible at present under the Irrigation Act without making a definite application and if his tenant takes the water that he has been ordered to take without getting the security of the Superior Holder, I am fairly sure that we have got no hold on the Superior Holder at all. In fact, it seems to me that a scheme under this Act could be quite easily made a dead letter or at least the collections of our irrigation revenue under this system could be made impossible by a conspiracy between the Superior Holder and his tenant." In the light of these observations the Public Works Department has requested the R.L.A. to consider whether the Bombay Irrigation Act, 1879 requires to be amended to make the superior holder responsible even where no definite water application has been made.

Owners of lands are bound to take water when by a scheme prepared and published under

sections 3 and 6 are so directed under section 7(b) of the Bombay Irrigated Crop Regulation Act, 1944 for irrigating the lands under command from the irrigation work in accordance with the procedure laid down in the Bombay Irrigation Act, 1879 and the rules made thereunder; "Owner" as defined in section 2(3) includes a holder and a tenant as defined in the Land Revenue Code. Both the Superior Holder and his tenant in an alienated village would be owners within the meaning of section 2(3) and liable to take water on being directed under section 7(b). If the tenant alone applies under section 27 of the Bombay Irrigation Act, 1879 the supply of water cannot be withheld on the ground that he has failed to obtain the security of his Superior Holder. In such cases the Superior Holder would not be liable and to that extent the view taken by the Commissioner, Central Division, is correct. But his view that unless the Bombay Irrigation Act, 1879, is amended the collection of irrigation dues in such cases would be impossible does not appear to be correct. Under section 57 of the Bombay Irrigation Act the arrears of water rate are recoverable as arrears of land revenue. Under section 153 read with section 187 of the Land Revenue Code an alienated holding for which arrear or is due can be forfeited. Consequently if the tenant fails to pay the water rate there appears no legal objection to enforcing payment thereof by having recourse to section 153

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of the Land Revenue Code. Consequently no amend-
ment of the Bombay Irrigation Act, appears necessary.

P.N.M
4/6/46.

Remembrancer of Legal Affairs.

U.R.to P.W.D. No. 4167 dated the 5th June 1946.

[redacted]

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